



December 20, 2018

Via FOIAonline.gov

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460

**Re: FOIA Request for Records Regarding EPA's National Oil and Hazardous Substances Pollution Contingency Plan Rulemaking (RIN 2050-AE87; EPA-HQ-OPA-2006-0090)**

Dear FOIA Officer:

ALERT, a project of the Earth Island Institute, requests disclosure of records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and relevant U.S. Environmental Protection Agency (EPA) regulations, 40 C.F.R. §§ 2.100-2.406. Specifically, ALERT seeks to educate itself, its membership, and the public about EPA's progress towards finalizing its 2015 Proposed Rule to amend the National Contingency Plan (NCP), governing oil and hazardous substance pollution. See EPA, Notice of Proposed Rulemaking to Revise the National Oil and Hazardous Substances Pollution Contingency Plan, 80 Fed. Reg. 3,380 (proposed January 22, 2015) (hereinafter "NPRM").

#### **I. Description of Records Sought**

ALERT requests copies of the following records<sup>1</sup> in EPA's possession:

1. From the time period starting on January 22, 2015 through the date of this request, all records—except the documents, including public comments, which are available on Regulations.gov in EPA Docket No. EPA-HQ-OPA-2006-0090—addressing, discussing, or referencing the Proposed Rule set forth in 80 Fed. Reg. 3,380 (Jan. 22, 2015).

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<sup>1</sup> In this request, the term "records" refers to any and all responsive materials, in whatever form (i.e., handwritten, typed, electronic, or otherwise produced, recorded, reproduced or stored), in EPA's possession, including, but not limited to, correspondence (including, but not limited to, inter- and intra-agency correspondence and correspondence with entities or individuals outside the federal government), emails, letters, notes, telephone notes, voicemails, facsimiles, minutes of meetings, memoranda, notices, charts, tables, presentations, scientific opinions, drafts, assessments, evaluations, phone logs, papers published or unpublished, reports, studies, photographs, videos, data, and maps. Please also note that this request seeks responsive records in or on the personal computers, cellphones, or other devices, or personal email accounts used by any federal employee or official if used for any government purpose.



2. From the time period starting on January 22, 2015 through the date of this request, all records—except the documents, including public comments, which are available on Regulations.gov in EPA Docket No. EPA-HQ-OPA-2006-0090—addressing, discussing, or referencing the rulemaking proceeding *Revisions to the National Oil and Hazardous Substances Pollution Contingency Plan; Subpart J Product Schedule Listing Requirements*, associated with RIN 2050-AE87.
3. Records addressing, discussing, referencing, relating to, presented in, generated during, or memorializing the EO 12866 meeting regarding the EPA rulemaking with RIN number 2050-AE87, held on October 23, 2014, at 10:00 am, and requested by Earthjustice.
4. Records addressing, discussing, referencing, relating to, presented in, generated during, or memorializing the EO 12866 meeting regarding the EPA rulemaking with RIN number 2050-AE87, held on September 23, 2014, at 2:30 pm, and requested by the Government Accountability Project.
5. Records addressing, discussing, referencing, relating to, presented in, generated during, or memorializing the EO 12866 meeting regarding the EPA rulemaking with RIN number 2050-AE87, held on August 28, 2014, at 10:00 am, and requested by the American Petroleum Institute.
6. Records addressing, discussing, referencing, relating to, presented in, generated during, or memorializing EPA's call, reported in EPA's Docket Note EPA-HQ-OPA-2006-0090-0359, with Exxon Mobil Representatives, on March 12, 2015.

FOIA requires EPA to notify ALERT, within twenty business days, whether the agency will comply with this request, and to what extent, or whether EPA requires a ten-day extension. 5 U.S.C. §§ 552 (a)(6)(A)(i), (B)(i). ALERT may be able to limit this request further if we have a better idea of the nature and scope of the records in EPA's possession. Please contact Earth Island Institute to discuss this possibility. Additionally, if the responsive records are voluminous, we are willing to accept the records on a rolling basis.

Under 5 U.S.C. § 552(a)(8)(A) agencies cannot deny a request for information under FOIA, unless the agency reasonably believes release of the information will harm an interest that is protected by an exemption. If EPA determines that release of some or all of the records requested will harm one or more interests protected by an exemption, then please identify the specific exemptions claimed and their relationship to the documents withheld. Finally, if EPA determines that portions of records requested are exempt from disclosure, we request that EPA segregate or redact the exempt portions and disclose the non-exempt portions.

## **II. Format of Requested Records**

FOIA requires EPA to make records available in “any form or format requested,” so long as they are “readily reproducible” in that form. 5 U.S.C. § 552(a)(3)(B). We prefer that for records available in a widely used electronic format (e.g., pdf, Excel, or Word), EPA provide the records in that format. Please do not provide electronic records in a single or “batched” pdf file. Finally, we request that EPA provide any indexing that may exist for responsive records.

## **III. Request for a Fee Waiver**

ALERT requests that EPA waive any fee it would otherwise charge in connection with this request. FOIA provides that requested records must be provided free of charge “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. §552(a)(4)(A)(iii); see *also* 40 C.F.R. §2.107(l)(1). Records responsive to this request are likely to contribute significantly to public understanding of the operations or activities of the federal government and are not primarily in the commercial interest of the requester.

### **1. This Request Concerns the “Operations and Activities of the Government.”**

The records requested here all relate to EPA’s operations and activities pertaining to the rulemaking to amend the National Oil and Hazardous Substances Pollution Contingency Plan, RIN 2050-AE87. EPA is a federal agency, and RIN 2050-AE87 is a rulemaking proceeding implementing EPA’s mandates under § 311 of the federal Clean Water Act (CWA), 33 U.S.C. § 1321 (d)(2) – (3). Thus, this request directly concerns the operations and activities of the federal government.

### **2. The Records Requested are “Likely to Contribute” to Public Understanding of Government Operations or Activities.**

The records requested are “likely to contribute” to the public’s understanding of government operations and activities, because the requesters will share these records with the public, and the records requested will shed light on whether EPA has neglected its CWA duty to maintain an NCP that is “effective” and “minimize[s] damage” from oil spills. See 33 U.S.C. § 1321 (d)(2) – (3); 40 C.F.R. §2.107(l)(2)(ii). Currently, there is no publicly available information shedding light on whether EPA has taken any action on its proposed rule to amend the NCP after the comment period closed on April 22, 2015. See 80 Fed. Reg. 3,380

(Jan. 22, 2015). EPA's failure to update the NCP in the past twenty-five years is an issue of great public concern: the NPRM received more than 80,000 public comments.<sup>2</sup> Despite substantial public interest in this rulemaking, EPA has neither finalized the rule nor issued any update on the status of the proceeding. The only publicly available information is EPA's most recent submission to the Fall 2018 Unified Agenda, which designates this proceeding a "long-term action," without any estimated date the final rule will issue.<sup>3</sup> Thus, EPA has left the public in the dark with respect to this critical rulemaking, and disclosure of the records requested herein would likely contribute to the public's understanding of EPA's operations and rulemaking activities to update the NCP.

3. The Records Requested Will Likely Contribute to an Understanding of the Subject by a Reasonably Broad Audience.

ALERT is well-suited to disseminate the information disclosed through this request. ALERT (since 2014) and its coalition predecessor (since 2010) is a community education organization that develops environmental justice leadership by working collaboratively to reduce toxic exposures from oil-chemical activities in at-risk communities. The coalition formed in response to the BP Deepwater Horizon oil spill (DHOS) disaster and petitioned EPA for this rulemaking in November 2012. The coalition updated our petition in February 2014 to include new evidence from the BP DHOS disaster and concerns of our new members regarding inadequacy of conventional oil spill response methods for unconventional oil spills. Finally, as ALERT, we educated our coalition to respond to this rulemaking in 2015. Our community of about 2,800 includes concerned citizens of coastal states, Great Lakes states, states along the Mississippi River corridor, and other inland states with oil extraction, transportation, or refining activities in their backyards. ALERT will review the disclosed records and share information therein via its membership correspondence, publications, website, social media, and community education materials. Additionally, Earth Island Institute, which serves as the fiscal sponsor of ALERT, will disseminate this information to the public through its website, electronic newsletter, and written publication.

4. The ALERT Project Has No Commercial Interest in the Records Requested.

ALERT does not have any commercial interest in the requested documents. 5 U.S.C. § 552(a)(4)(iii); 40 C.F.R. § 2.107(l)(1), (3). ALERT is grassroots effort and project of Earth Island Institute, a 501(c)(3) nonprofit organization incorporated in California in 1982. Thus, neither ALERT nor Earth Island Institute have any commercial interest, and neither will realize any commercial benefit from the release of the requested information.

If EPA denies this fee waiver, please contact Earth Island Institute to discuss the basis of this denial.

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<sup>2</sup> See EPA Docket Number: EPA-HQ-OPA-2006-0090-0359.

<sup>3</sup> EPA, Unified Agenda Fall 2018, RIN 2050-AE87, available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=2050-AE87>

#### **IV. Conclusion**

Thank you for your prompt attention to this matter. If you have any questions or need further information to process this request, please do not hesitate to contact me at 510-859-9120 or [sumona@earthisland.org](mailto:sumona@earthisland.org).

Sincerely,

Sumona Majumdar  
General Counsel